

35. In a competitive market, excessively high returns would be expected to only be temporary as new competitors looking to maximize wealth discovered the high returns and entered the market, bidding down prices to garner a share of the high returns.

36. In the case of cellular carriers in major California markets, returns have remained at high levels over an extended period, compared with returns realized by other entities regulated by the CPUC.

37. In I.88-11-040, the DRA demonstrated that cellular carriers' returns exceeded returns of industries with comparable risks.

38. D.90-06-025 provided a guideline for detecting the profits which exceeded acceptable levels for cellular duopolists, by distinguishing profits explained by the scarcity of spectrum from profits due solely to a failure to compete.

39. Evidence of profits due to a failure to compete would be pricing of services so high as to discourage full system utilization or failure to invest in system expansion when it is economically justified.

40. While cellular usage and system expansion have grown dramatically over the past decade, this is indicative of the demographics of the market demand for cellular service during the earliest stages of the initial birth and growth of a new market.

41. In detecting whether cellular carriers profits reflect a failure to compete, the question is not whether expansion has occurred, but how much more rapidly expansion would have occurred had uncompetitively high prices not inhibited demand.

42. Despite the growth rate of cellular in California, still only about 5% of the population use a cellular phone.

43. According to a study by DRA, the L.A. market has an efficiency ratio of 635 subscribers per each frequency which is at least three times larger than the next largest market, indicating ample capacity for new subscribers, at least in other markets.

44. DRA's study found that even for the L.A. market, only certain parts were capacity constrained and would need significant investment to expand service.

45. With the growth among cellular carriers of digital technology as a replacement for analog, the previous constraints of spectrum scarcity should eventually be eliminated.

46. The presence of excessive duopoly rents extracted by cellular carriers is evident from the relatively high valuations which investors ascribe to the cellular spectrum compared with other spectrum valuations.

47. A 1991 Morgan Stanley Wall Street analyst report advised investors that an investment value for cellular spectrum of between \$170 to \$200 per POP was reasonable only because of the enormous returns possible from a shared-monopoly business.

48. By contrast to cellular spectrum, the valuation, spectrum used for SMR mobile communications was only valued at \$42 per POP by MCI in its investment in NEXTEL.

49. In his testimony before the California Board of Equalization, the expert witness of LACTC testified that the high cellular license value is because of the market control provided by the FCC license and the resulting high earnings that result from the duopoly market in contrast to a competitive market structure.

50. As a result of market entry restrictions, lack of competitive substitutes, control over essential bottleneck facilities, uncompetitive pricing practices, excessively high duopoly rents, and cellular spectrum valuations, it can be seen that wholesale cellular carriers exert dominant market power.

51. The OII sets forth the policy goal that the radio transmission bottleneck should be made available on an unbundled basis from all other aspects of services cellular duopolists offer.

52. Beyond the mere publishing of unbundled rates, competing providers need the opportunity to interconnect into the cellular carriers' systems on a basis that does not place them at a competitive disadvantage.

53. Although there remain technical uncertainties as to the specific interconnection functions feasible for a reseller switch, we found in D.92-10-026 that market forces could be relied upon to influence when individual resellers elect to install a switch and no further showing of technical feasibility was required.

54. It would require an excessive commitment of time and resources to undertake cost-of-service studies and to implement cost-based unbundling of rate elements for cellular service.

55. The comments filed in this investigation, together with the record developed in D.92-10-026, however, form a sufficient basis to implement a more limited market-based unbundling, based upon existing tariffed elements with prices capped at existing levels.

56. EAS is provided when a carrier serves a subscriber of another home carrier while the subscriber is temporarily roaming within the service territory of the foreign carrier.

57. In billing a subscriber for EAS service, the home carrier will re-rate the charges it incurs from the foreign carrier which may result either in an over or underrecovery of costs by the home carrier.

58. Certain parties, such as DRA, contend that carriers' CPCNs do not permit EAS service since it extends outside the authorized service territory specified in the CPCN.

59. Cellular resellers are to be treated as cellular carriers for interconnection purposes according to D.92-10-026.

**Conclusions of Law**

1. There is no provision of the Federal Communications Act Section 332 prohibiting modifications in specific state regulatory rules prior to the date when the FCC acts on California's petition to retain jurisdiction over ratemaking of cellular carriers.

2. The proposed framework for regulating service providers based upon a "dominant"/"nondominant" classification is appropriate and should be adopted as a standard for further development of a regulatory framework.

3. Facilities-based cellular carriers should be classified as "dominant" for purposes of regulation under our framework as set forth in the OII.

4. California regulatory jurisdiction over facilities-based cellular carriers should continue under existing Rateband Guideline rules (incorporating interim changes adopted herein) pending adoption of a comprehensive regulatory framework for the mobile services market through a final order in this Investigation.

5. Continued regulation of cellular carriers is required to protect consumers from unreasonable or discriminatory rates until future market changes indicate that cellular carriers no longer hold market dominance.

6. There is no federal statute, policy, or rule that inhibits the interconnection and use of the reseller switch as defined by D.92-10-026.

7. It is reasonable to adopt market-based unbundling of cellular carrier rates, based upon the terms prescribed in the order below.

8. Cost of service regulation should not be pursued as a regulatory option for facilities-based carriers.

9. There is no legal prohibition against cellular carriers re-rating of charges for EAS since no construction of facilities outside of the designated service territory of the carrier is involved in offering the EAS service.

10. It is reasonable that intercarrier agreements for EAS service be publicly filed, and that any serving carrier charge the same wholesale rate to resellers as to other serving cellular carriers.

11. It is reasonable that a serving carrier providing EAS service charge a wholesale rate to the served carrier (including resellers).

12. It is reasonable to retain price caps at existing rate levels to protect consumers against duopoly market power until the market becomes competitive.

13. Remaining issues pertinent to this Investigation not resolved by this order should be addressed in the next phase of this Investigation.

#### ORDER

##### **IT IS ORDERED that:**

1. Cellular resellers are authorized to file applications amending their certificates of public convenience and necessity (CPCNs) from a switchless to a switched reseller status upon meeting the following conditions:

- a. The reseller must submit to the cellular carrier a bona fide request for unbundled service, accompanied by an engineering plan describing how the provider would interconnect with the dominant carrier's mobile telephone switching office (MTSO). The plan would have to demonstrate the compatibility between the reseller's switch and the dominant carrier's MTSO.
- b. Once the bona fide request is submitted to the cellular carrier, the reseller must file a petition to modify its existing CPCN to change its status to that of a switch-based reseller and to ensure compliance with the California Environmental Quality Act.

2. The Commission order approving the change in the reseller CPCN as described in Ordering Paragraph 1 above shall also be served on the cellular carrier which received the request for interconnection.

3. The Commission order shall direct such carrier to promptly file an advice letter with the Commission to amend its wholesale tariff reflecting a market-based unbundling of access charges billed to such switch-based resellers which have entered into interconnection agreements.

4. Upon activation of the interconnection arrangement with the reseller, its billing shall be adjusted by applying a credit equal to the access charge on the reseller's bill.

5. Carriers engaged in Extended Area Service (EAS) intercarrier agreements shall publicly file such agreements with the Commission.

6. Any serving carrier providing EAS service shall charge a wholesale rate to the served carrier (including resellers).

7. This Investigation shall remain open for further study of outstanding issues not resolved by this interim order and adoption of a comprehensive framework for the mobile telephone service market.

This order is effective today.

Dated August 3, 1994, at San Francisco, California.

DANIEL Wm. FESSLER  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
Commissioners

I dissent.

/s/ PATRICIA M. ECKERT  
Commissioner

I dissent.

/s/ NORMAN D. SHUMWAY  
Commissioner

Source:  
Opening Comments of  
Cellular Services, Inc.

# **NCRA**

**NATIONAL CELLULAR RESELLERS ASSOCIATION**

**COMPARISON  
OF CELLULAR SERVICE PRICES  
IN THE  
30 LARGEST MARKETS  
FOR PERSONAL SAFETY  
AND CONVENIENCE  
USE:  
JANUARY, 1988 - JANUARY, 1994**

**January 24, 1994**

**1825 Eye Street, N.W., Suite 400, Washington, D.C. 20006 (202) 479-2014: FAX: (202) 857-8897**

1/24/94

**NATIONAL CELLULAR RESELLERS ASSOCIATION****COMPARISON OF CELLULAR SERVICE PRICES FOR PERSONAL  
SAFETY AND CONVENIENCE USE: JANUARY, 1988 - JANUARY, 1994**

The following table shows the best rates available in the 30 largest cellular markets for 30 minutes of monthly airtime in January, 1988 and January, 1994. NCRA believes this amount of airtime, divided into 20 minutes of usage during peak hours and 10 minutes of usage during off-peak hours, represents a reasonable calling pattern for individuals using a cellular phone chiefly for personal safety and convenience.

1988 \$ DMT	Market #	City	System	1988	1994	% Change	1994 \$ DMT
\$3.50	1	New York	A	\$32.50	\$36.99	23.0%	\$5.00
			B	\$36.00	\$45.85	26.8%	
\$0.00	2	Los Angeles	A	\$45.00	\$45.00	0.0%	\$0.00
			B	\$45.00	\$45.00	0.0%	
\$1.00	3	Chicago	A	\$20.00	\$28.35	41.5%	\$4.14
			B	\$21.00	\$24.21	15.3%	
\$1.00	4	Philadelphia	A	\$22.95	\$34.85	52.3%	\$0.30
			B	\$23.95	\$34.85	44.7%	
\$0.00	5	Detroit	A	\$16.10	\$30.95	92.2%	\$0.00
			B	\$16.10	\$30.95	92.2%	
\$3.00	6	Boston	A	\$22.50	\$33.15	47.3%	\$5.20
			B	\$19.50	\$27.95	43.3%	
\$0.00	7	San Francisco	A	\$56.00	\$44.74	-20.1%	\$0.26
			B	\$56.00	\$45.00	-19.6%	
\$1.85	8	Wash/Balt	A	\$22.00	\$33.70	53.2%	\$0.85
			B	\$23.95	\$34.85	44.7%	
\$0.00	9	Dallas	A	\$30.00	\$42.39	41.3%	\$0.44
			B	\$30.00	\$41.95	39.6%	
\$2.75	10	Houston	A	\$28.95	\$31.99	10.5%	\$7.96
			B	\$28.20	\$39.95	52.5%	
\$0.00	11	St. Louis	A	\$23.00	\$26.95	17.2%	\$3.00
			B	\$23.00	\$29.95	30.2%	
\$4.50	12	Miami	A	\$30.00	\$82.70	75.7%	\$3.15
			B	\$34.50	\$49.55	43.8%	
\$18.75	13	Pittsburgh	A	\$14.20	\$39.99	181.5%	\$1.94
			B	\$32.95	\$38.05	15.5%	

APPENDIX 1  
Page 3

\$8.80	15 Minneapolis	A	\$28.85	\$32.24	11.4%	
		B	\$35.55	\$35.55	0.8%	\$3.51
\$0.05	16 Cleveland	A	\$27.95	\$30.85	10.7%	
		B	\$28.00	\$29.75	6.3%	\$1.20
\$0.00	17 Atlanta	A	\$40.00	\$33.70	-15.7%	
		B	\$40.00	\$41.75	4.4%	\$8.05
\$8.35	18 San Diego	A	\$45.00	\$38.55	-14.3%	
		B	\$38.55	\$38.00	3.7%	\$1.45
\$8.05	19 Denver	A	\$29.50	\$38.50	30.8%	
		B	\$35.55	\$38.95	3.9%	\$0.38
\$11.75	20 Seattle	A	\$29.50	\$29.89	1.7%	
		B	\$41.25	\$29.85	-27.4%	\$0.04
\$1.30	21 Milwaukee	A	\$20.00	\$29.85	49.7%	
		B	\$21.30	\$27.00	26.8%	\$2.95
\$0.80	22 Tampa	A	\$28.80	\$34.95	30.4%	
		B	\$27.80	\$48.45	68.3%	\$11.50
\$0.05	23 Cincinnati	A	\$17.95	\$30.95	72.4%	
		B	\$18.00	\$24.91	38.4%	\$8.04
\$0.00	24 Kansas City	A	\$25.50	\$33.45	31.2%	
		B	\$25.50	\$35.85	40.6%	\$2.40
\$13.10	25 Buffalo	A	\$25.10	\$27.85	10.2%	
		B	\$12.00	\$23.35	94.6%	\$4.30
\$8.80	26 Phoenix	A	\$28.95	\$39.25	35.6%	
		B	\$35.55	\$40.25	13.2%	\$1.00
\$3.00	28 Indianapolis	A	\$12.00	\$28.85	124.6%	
		B	\$15.00	\$24.95	66.3%	\$2.00
\$9.40	29 New Orleans	A	\$42.90	\$33.95	-20.9%	
		B	\$33.50	\$33.95	1.3%	\$0.00
\$1.50	30 Portland	A	\$25.00	\$35.00	40.0%	
		B	\$23.50	\$33.50	42.6%	\$1.50
\$3.78	Averages		\$28.67	\$35.12	+32.4%	\$2.84

The monthly airtime charges contained in this report were calculated by using data obtained from Information Enterprises and the customer service departments of the licensed carriers in each market listed above. The monthly airtime charges reflect the best rates available on service contracts not exceeding one year in length.

(END OF APPENDIX 1)

## APPENDIX 2

Source:

Calif Legislative Hearings  
1-12-93  
Hearing Record

TABLE 2

**DRA AND MCCA W  
CELLULAR RATE COMPARISON CHART**

(REGULATED MARKETS ARE IN BOLD ITALICS.)

CITY	DRA (A)		DRA (B)		MCCA W(1)	
<b>LOS ANGELES</b>	<b>\$98.00</b>	<b>100.00%</b>	<b>\$98.00</b>	<b>98.02%</b>	<b>\$98.84</b>	<b>98.05%</b>
<b>NEW YORK</b>	<b>\$98.00</b>	<b>100.00%</b>	<b>\$101.00</b>	<b>100.00%</b>	<b>\$100.81 *</b>	<b>100.00%</b>
<b>PHILADELPHIA</b>	<b>\$97.24</b>	<b>98.22%</b>	<b>\$86.00</b>	<b>85.15%</b>	<b>\$89.53 *</b>	<b>68.97%</b>
<b>SAN FRANCISCO</b>	<b>\$95.00</b>	<b>95.98%</b>	<b>\$95.00</b>	<b>94.06%</b>	<b>\$92.58</b>	<b>91.84%</b>
<b>MIAMI</b>	<b>\$93.00</b>	<b>93.94%</b>	<b>\$92.00</b>	<b>91.09%</b>	<b>\$86.07 *</b>	<b>85.38%</b>
<b>SEATTLE</b>	<b>\$93.00</b>	<b>93.94%</b>	<b>\$95.00</b>	<b>94.06%</b>	<b>\$81.28</b>	<b>80.63%</b>
<b>DENVER</b>	<b>\$83.00</b>	<b>83.84%</b>	<b>\$88.00</b>	<b>87.13%</b>	<b>\$73.32 *</b>	<b>72.73%</b>
<b>DALLAS</b>	<b>\$80.40</b>	<b>81.21%</b>	<b>\$89.35</b>	<b>88.47%</b>	<b>\$74.69</b>	<b>74.09%</b>
<b>HOUSTON</b>	<b>\$77.00</b>	<b>77.78%</b>	<b>\$92.00</b>	<b>91.09%</b>	<b>\$72.44 *</b>	<b>71.86%</b>
<b>MINNEAPOLIS</b>	<b>\$76.00</b>	<b>76.77%</b>	<b>\$76.00</b>	<b>75.25%</b>	<b>\$73.41</b>	<b>72.82%</b>
<b>BOSTON</b>	<b>\$74.00</b>	<b>74.75%</b>	<b>\$78.00</b>	<b>77.23%</b>	<b>\$73.33</b>	<b>72.74%</b>
<b>DETROIT</b>	<b>\$72.44</b>	<b>73.17%</b>	<b>\$70.31</b>	<b>69.61%</b>	<b>\$55.72 *</b>	<b>55.27%</b>
<b>WASHINGTON, D.C.</b>	<b>\$72.00</b>	<b>72.73%</b>	<b>\$73.00</b>	<b>72.28%</b>	<b>\$63.06 *</b>	<b>62.55%</b>
<b>SACRAMENTO</b>	<b>\$60.00</b>	<b>60.61%</b>	<b>\$52.00</b>	<b>51.49%</b>	<b>\$58.20</b>	<b>57.73%</b>
<b>CHICAGO</b>	<b>\$59.00</b>	<b>59.60%</b>	<b>\$62.00</b>	<b>61.39%</b>	<b>\$53.84</b>	<b>53.41%</b>
<b>PITTSBURGH</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>\$74.15 *</b>	<b>73.55%</b>
<b>TAMPA</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>\$75.91 *</b>	<b>75.30%</b>

PERCENTAGES ARE RELATIVE TO LOS ANGELES RATES.

\* REQUIRES COMMITMENT TO ONE YEAR CONTRACT

(1) REVISED TO INCLUDE ACTIVATION FEE &amp; ALLOCATION OF FREE MINUTES

(A) NON-WIRELINE CARRIER

(B) WIRELINE CARRIER

## ASSUMPTIONS:

1. ALL RATES ARE BASED ON 120 MINUTES OF USE (80% PEAK/20% OFF PEAK).
2. RATES FOR BOSTON, HOUSTON, PHILADELPHIA, AND SACRAMENTO WERE ADDED BY DRA USING MCCA W ASSUMPTIONS.

(END OF APPENDIX 2)

Source: Opening Comments of MARKET-BY-MARKET RATE MARGIN ANALYSIS

Cellular Resellers Association

Existing resellers generally have more than 1000 customers and the average reseller uses more than 300,000 peak minutes and 50,000 off-peak minutes of airtime. This analysis reflects these facts.

Los Angeles

Los Angeles SMSA (PacTel/GTE)

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$32.26	28.31%
Peak	\$ 0.45	\$ 0.366	18.67%
Off-Peak	\$ 0.27	\$ 0.22	18.52%

Los Angeles Cellular Telephone Company  
(McCaw/AT&T/BellSouth)

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$32.26	28.31%
Peak	\$ 0.45	\$ 0.366	18.67%
Off-Peak	\$ 0.27	\$ 0.22	18.52%

San Francisco/San Jose

GTE Mobilnet

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$28.25	37.22%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Bay Area Cellular Telephone Company  
(PacTel/AT&T/McCaw)

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access			
(Ceiling Rates)			
0-99 mins. per number	\$45.00	\$28.25	37.22%
100-199 mins. per number	\$42.50	\$26.70	37.18%
200-299 mins. per number	\$40.00	\$25.15	37.13%
300 + mins. per number	\$37.50	\$23.55	37.20%
(New Rates effective 4/26/93)			
0-399 mins. per number	\$39.99	\$25.10	37.23%
400 + mins. per number	\$37.50	\$23.55	37.20%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Napa

GTE Mobilnet

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$28.25	37.22%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Napa Cellular (AT&T/McCaw/PacTel)

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access			
0-99 mins. per number	\$45.00	\$28.25	37.22%
100-199 mins. per number	\$42.50	\$26.70	37.18%
200-299 mins. per number	\$40.00	\$25.15	37.13%
300 + mins. per number	\$37.50	\$23.55	37.20%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

I.93-12-007

GTE MobilnetSalinasAPPENDIX 3  
Page 2

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$28.25	37.22%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Salinas Cellular (PacTel/AT&T/McCaw)

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access			
0-99 mins. per number	\$45.00	\$28.25	37.22%
100-199 mins. per number	\$42.50	\$26.70	37.18%
200-299 mins. per number	\$40.00	\$25.15	37.13%
300 + mins. per number	\$37.50	\$23.55	37.20%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Santa CruzGTE Mobilnet

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$28.25	37.22%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Santa Cruz Cellular

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$28.15	37.44%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Santa RosaGTE Mobilnet

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$45.00	\$28.25	37.22%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

Caral Cellular (AT&T/McCaw/PacTel)

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access			
0-99 mins. per number	\$45.00	\$28.25	37.22%
100-199 mins. per number	\$42.50	\$26.70	37.18%
200-299 mins. per number	\$40.00	\$25.15	37.13%
300 + mins. per number	\$37.50	\$23.55	37.20%
Peak	\$ 0.45	\$ 0.36	20%
Off-Peak	\$ 0.20	\$ 0.16	20%

San DiegoPacTel Cellular

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$35.00	\$24.50	30%
Peak	\$ 0.40	\$ 0.305	26.49%
Off-Peak	\$ 0.20	\$ 0.152	24%

U.S. West Cellular

	<u>Retail Rates</u>	<u>Wholesale Rates</u>	<u>Margin</u>
Access	\$35.00	\$25.20	28%
Peak	\$ 0.40	\$ 0.274	31.5%
Off-Peak	\$ 0.20	\$ 0.133	33.5%

L/mal

OCT 17 1994

Decision 94-10-040 October 12, 1994

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's	)	
own motion into the regulation of	)	Investigation 88-11-040
cellular radiotelephone utilities.	)	(Filed November 23, 1988)
<hr/>		
	)	Application 87-02-017
	)	(Filed February 6, 1987)
And related matters.	)	
<hr/>		

**ORDER GRANTING LIMITED REHEARING OF DECISION 94-04-043**

Nextel Communications, Inc. (Nextel) and Cellular Resellers Association, Inc. (CRA), have applied for rehearing of Decision 94-04-043.<sup>1</sup> Decision 94-04-043 eases the filing requirements for cellular carriers and resellers, via advice letter filings, by permitting, amongst other things, use of the temporary tariff procedure for new services. The challenged decision modifies Decision 90-06-025 (36 Cal.P.U.C.2d 464), an interim opinion that addresses Phases I and II of the Order Instituting Investigation (No. 88-11-040) into the regulation of cellular radiotelephone utilities to achieve the policy goals of enhanced competition and encouragement of innovative and quality services.

Decision 90-06-025 enunciated the regulatory framework and goals for the cellular industry in California: universal

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1. CRA has applied for a partial rehearing of Decision 94-04-043 and General Order (GO) 96-A. GO 96-A was approved by the Commission on January 2, 1962 by Resolution U-1038 and was most recently amended on September 28, 1988 by Decision 88-09-059. Accordingly, CRA has not filed a timely application for rehearing of GO 96-A (see Commission Rules of Practice and Procedure, rule 85) and we will dismiss that portion of CRA's application. CRA's application was timely filed with respect to Decision 94-04-043. (Id.)

service, economic efficiency, technological advancements, utilization of the local exchange carriers (LECs), anticompetitive behavior, and financial and rate stability. (36 Cal.P.U.C.2d at 474.) Decision 90-06-025, as modified by Decision 90-10-047, provides for a temporary status, effective on the date filed, for cellular carriers' and resellers' rate reduction tariffs which will not have an impact of more than 10 percent on the average monthly bill of the carrier's customers. (D.90-06-025, 36 Cal.P.U.C.2d, at 516, Ordering Paragraph 8.b., as modified by D.90-10-047, at 4, Ordering Paragraph 2(e); see also, Re U.S. West Cellular of California, Inc. (1992) 43 Cal.P.U.C.2d 367, 371-372 (Decision 92-02-076).) Decision 90-06-025 was further modified to clarify that the temporary tariff procedure was available only to advice letter filings that met certain qualifications, among them that the proposed offer should not reduce the margin between wholesale and retail rates. (D.92-02-076, 43 Cal.P.U.C.2d, at 374.) Among other things, Decision 94-04-043 extends the temporary tariff status to new services.

The temporary tariff procedure was expressly created in order to permit "... carriers to make small, simple, and non-controversial rate reductions without the administrative costs of full-blown applications or advice letters...." (Id., at 372.) The Commission never intended to "... guarantee that ... [we] would approve any proposed offer without examining it, provided the carrier labeled it a temporary tariff filing." (Ibid.)

Decision 94-04-043 responds to an assigned Commissioner's ruling (ACR), issued on December 2, 1993. The ACR proposed two modifications to Decision 90-06-025 and two exceptions to General Order (GO) 96-A for the cellular industry:

The proposed modifications to the Phase II Decision include (1) eliminating both the filing requirements to obtain temporary tariff authority and the 10 percent maximum rate reduction rule; and (2) relaxing the gift rule under certain circumstances. The [GO] 96-A exceptions include (1) relaxing the regulatory requirements for withdrawal of

optional plans and (2) relaxing the pre-approval process for provisional tariffs.... This Ruling also seeks comments on two additional regulatory topics. First, ... [regarding] an "Important Information Booklet" .... The second topic addresses the Commission's policies on contracts and the disposition of numerous automatically renewable contract advice letters that have been filed in violation of that policy....

Currently, a large number of matters are pending before the Commission which relate to cellular service.... Consequently, parties are directed to restrict their comments to issues raised in this ruling and not relitigate or argue issues which will be addressed in other proceedings. Nor should parties argue for broadening the scope of this Ruling or proposing additional flexibility. (12/2/93 ACR, at 1-2.)

The ACR specifically noted that the issues raised by it "are minor or non-controversial in nature." (*Id.*, at 2.)<sup>2</sup>

PacTel Cellular (now AirTouch) filed comments to the ACR on December 28, 1993. In its comments, PacTel stated that it assumed that the Commission would permit service providers to utilize the temporary tariff procedure for new service plans. CRA objected to PacTel's comments in its reply comments, arguing that PacTel's proposal to utilize temporary tariff authority for new plans would violate both existing and proposed temporary tariff guidelines as well as the Rate Band Guidelines. CRA additionally alleged that PacTel's proposal to use temporary

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2. The ACR requested comments on the following topics: elimination of the ten percent rate reduction limit and the filing requirements for temporary tariff authority regarding such rate reductions; elimination of the pre-approval requirement for the provisional tariff subject to certain safeguards; granting cellular companies the authority to withdraw optional service plans without Commission approval; and elimination of the \$100 maximum value level for service in the "nominal gift" category. (12/2/93 ACR, at 3-6.)

tariff authority for provisional plans also contradicts the ACR. Nextel did not comment on PacTel's comments.

Decision 94-04-043 acknowledges that the ACR directed parties "not to argue to broaden the Ruling's scope or to propose additional flexibility...." (D.94-04-043, at 2.) Decision 94-04-043 notes that several parties sought to extend the ACR's scope in their comments, providing, "Such comments, to the extent that they exist, were not responsive to the Ruling and, accordingly, not considered." (Id.) However, Decision 94-04-043 addresses PacTel's comments, noting its proposal that new service plans be specifically identified in the temporary tariff procedure. (D.94-04-043, at 4.) Decision 94-04-043 then describes CRA's opposition to PacTel's proposal, noting, "CRA is correct." (Id.) However, Decision 94-04-043 further provides, "... we are considering flexible modifications to the existing temporary tariff procedures. An extension of the temporary tariff procedure to include new tariff services is consistent with our goal ...." (Ibid.)

CRA's and Nextel's applications raise two central questions. One is whether an "issue" (e.g., a proposal to increase flexibility) that is raised by one party in comments to a Commissioner's proposed ruling, where the ACR specifically stated that parties are not to broaden the ruling's scope or propose additional flexibility, provides the other parties with sufficient notice of the issue, in accord with the constitutional guarantee of due process. The other question is whether the ability of a cellular carrier to offer preferential treatment to some of its customers creates a preferential environment in violation of the antidiscriminatory provisions of Public

Utilities Code sections 453 and 532, as well as the provisions of the antitrust laws.<sup>3</sup>

Due process and Public Utilities Code section 1708

The applicants allege that the challenged decision violates the rule of due process as well as section 1708<sup>4</sup> because it modifies previous Commission decisions concerning the temporary tariff procedure for the cellular industry without notice and an opportunity to be heard.

It is true that Decision 94-04-043 amends previous Commission decisions on this issue and it did so in response to comments on an ACR that specifically directed the parties not to broaden the scope of the ACR. Further, the Commission never issued notice that it was proposing to extend the temporary tariff procedure to new services.

Some parties have argued in their responses to the applications for rehearing of Decision 94-04-043 that CRA and Nextel received adequate notice that new service plans could be filed under the temporary tariff procedure via the comments to the ACR filed by PacTel. AirTouch (formally PacTel Cellular) also suggests that the authority to use the temporary tariff procedure already existed for new service plans since the CACD has approved advice letters filed on one-day notice offering new plans. However, this latter argument appears to be specious,

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3. All statutory references are to the Public Utilities Code unless otherwise indicated.

4. Section 1708 provides in part:

The [C]ommission may at any time, upon notice to the parties, and with an opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it....

since the challenged decision, by its terms, granted such authority.

Section 1708 requires the Commission, not parties, to provide notice of any modification, alteration, amendment or rescission of one of its decisions. Under the Constitution, the Commission is required to provide adequate notice to the parties of such a change to one of its decisions. Further, by Decision 92-02-076 the Commission specifically stated that we would "... put all carriers on notice that we do not make a practice of approving tariff changes without looking at their appropriateness for the procedure, or for the interests of the ratepayers, or for the industry." (Re U.S. West Cellular of California, Inc., supra, 43 Cal.P.U.C.2d, at 372.) Here, however, the change was adopted based on comments to an ACR that specifically prohibited any broadening of its limited scope. Decision 94-04-043 justifies the adoption of the PacTel proposal as a means of furthering competition. However, we realize that that justification does not counterbalance the legal duties, obligations and requirements placed upon the Commission. The allegations of error on the issue of due process and violation of section 1708 are meritorious. Since the parties were denied their right to a hearing on this issue, the proper remedy is to now grant a hearing on it.

Further, we realize that Decision 94-04-043 could be interpreted as inconsistent. The ACR specifically advised parties not to broaden its scope. The challenged decision notes this and further advises that comments that sought to broaden the ACR were non-responsive and therefore, not considered. (D.04-04-043, at 2.) Nonetheless, the challenged decision acknowledges that PacTel's proposal is an "extension of the temporary tariff procedure to include new services" and further notes that it is considering "flexible modifications to the existing temporary tariff procedures." (D.94-04-043, at 4 (emphasis added).) Finally, the challenged decision actually vindicates CRA's

challenge to PacTel's proposal as violating the existing temporary tariff procedures and guidelines. (Id.)

Discrimination and Public Utilities Code sections 453 and 532

Decision 94-04-043 also modifies the gift limits of Decision 90-06-025. Decision 90-06-025, as modified by Decision 90-10-047, provides that "No provider of cellular telephone service may provide, either directly or indirectly, any gift of any article or service of more than nominal value ... to any customer or potential customer in connection with the provision of cellular telephone service." (D.90-06-025, 36 Cal.P.U.C.2d, at 517, Ordering Paragraph 16.b, as modified by D. 90-10-047, at 5, Ordering Paragraph 2(j).)

Nextel and CRA contend that Decision 94-04-043 permits the cellular carriers the ability to use temporary tariffs, coupled with large gifts of service, to introduce new service plans without any review by the Commission through tariffed promotional offers that are effective for one day only and thus, possibly for the benefit of only one customer. Accordingly, Nextel argues that this could create an advantage for that one customer that would violate the provisions of section 453. CRA concurs and further alleges a violation of section 532.<sup>5</sup>

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5. Section 453 provides in part:

(a) No public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(Footnote continues on next page)

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(Footnote continued from previous page)

(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status....

(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service....

Section 532 provides in part:

... [N]o public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time, nor shall any public utility engaged in furnishing or rendering more than one product, commodity, or service, charge, demand, collect, or receive a different compensation for the collective, combined, or contemporaneous furnishing or rendition of two or more of such products, commodities, or services, than the aggregate of the rates, tolls, rentals, or charges specified in its schedules on file and in effect at the time ... nor shall any such public utility refund or remit ... in any manner or by any device, any portion of the rates, tolls, rentals, and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any

(Footnote continues on next page)

As referenced above, the Commission's decision to permit temporary tariff filings for new services appears to have been made in violation of the law and the proper remedy is to hold a hearing on the issue. It is possible that temporary tariffing of new services could result in an advantage or disadvantage to some customers. However, there is no way of knowing, without evidence, whether such discrimination is likely to be reasonable or not. The issue of discrimination with respect to this issue should be addressed during the hearing on this question.

#### Antitrust considerations

Nextel and CRA allege that the decision to permit temporary tariff filings for new services may have anticompetitive effects. Nextel argues that the Commission is obligated to render findings and conclusions on the question of the alleged anticompetitive impact of alleged discrimination that may result from permitting temporary tariffing procedures for new services. (See e.g., Northern California Power Agency v. Public Util. Com. (1971) 5 Cal.3d 370 ("The Commission may and should

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(Footnote continued from previous page)

facility or privilege except such as are regularly and uniformly extended to all corporations and persons. The [C]ommission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility.

consider sua sponte every element of public interest affected by facilities which it is called upon to approve."))

Findings on the issue of competition alone do not adequately satisfy the rule of NCPA, supra, when there are antitrust issues before the Commission. Temporary tariff procedures and relaxation of the gift rule for new services may well raise antitrust issues. Accordingly, our decisions approving or denying such procedures should contain findings and conclusions on antitrust issues. Decision 94-04-043 does not. Since we have determined that rehearing on the temporary tariff procedure for new services question is required, we will use that opportunity to review and respond to the antitrust questions raised by the issue.

Upon reviewing each and every allegation of error raised by Nextel and CRA, as discussed above, we conclude that grounds for rehearing of Decision 94-04-043 have been established. Moreover, that portion of Decision 94-04-043 granting cellular carriers authority to use temporary tariff filings for establishing new service plans should be stayed pending a decision on rehearing. No further discussion is necessary of the issues raised by Nextel and CRA.

Therefore, **IT IS ORDERED** that:

1. Rehearing of Decision 94-04-043 is granted on the limited issue of whether cellular carriers should be authorized to use temporary tariff filings for establishing new service plans.

2. Rehearing shall be held at such time and place and before such Administrative Law Judge as shall hereafter be provided.

3. Ordering Paragraph 1 of Decision 94-04-043 is stayed in part, with respect to temporary tariff procedures for new service plans, pending a decision on rehearing.

4. The Executive Director shall provide notice of this rehearing to all parties in the manner prescribed by rule 52 of the Commission's Rules of Practice and Procedure.

This order is effective today.

Dated October 12, 1994, at San Francisco, California.

DANIEL Wm. FESSLER  
President  
NORMAN D. SHUMWAY  
P. GREGORY CONLON  
Commissioners

Commissioner PATRICIA M. ECKERT  
being necessarily absent, did not  
participate.

Commissioner JESSIE J. KNIGHT, JR.  
being necessarily absent, did not  
participate.

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## California Public Utilities Commission

# NEWS RELEASE

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April 6, 1994

CPUC-027  
(A93-07-017)

### CPUC REJECTS CELLULAR SETTLEMENT

The California Public Utilities Commission (CPUC), rejected a proposed settlement between cellular wholesaler Sacramento-Valley Limited Partnership (SVLP) and resellers as "pragmatic compromise." The proposal would have raised retail customer rates while assuring higher revenues for SVLP and a better pricing margin for resellers.

The CPUC said the proposed settlement did not meet its "all-parties" criterion, which requires that all parties affected by a proceeding negotiate and agree to a settlement. In this case, no consumer representatives were involved in negotiations. Moreover, the proposal ignored key substantive issues that warrant formal hearings.

SVLP filed for a 14.5 percent rate increase in July 1993, or \$9.9 million more in revenues for an operating budget of \$78 million. In August, the Cellular Resellers' Association (CRA) formally protested and 47 SVLP customers wrote to the CPUC to complain about the rate increase.

CRA opposed the wholesale rate increase, charging SVLP with "cross-subsidizing," or taking wholesale profits stemming from reseller charges to underwrite the purchase of distribution channels, and cut off reseller competition.

The proposed settlement, submitted last December, improved profit margins for resellers with respect to wholesale airtime rates for peak and off-peak usage and provided a margin for roaming services. However, the proposed increase in consumer retail rates was not altered.

The CPUC found that the proposed settlement does not resolve the substantive question raised by CRA as to whether the correct

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CPUC REJECTS CELLULAR SETTLEMENT -2-2-2

approach has been used to allocate costs between wholesale and retail operations as a means to check against anticompetitive cross-subsidization. SVLP also failed to justify increases in its retail and roamer rates.

The settlement agreement was contingent, moreover, on the CPUC approving its terms without change. The CPUC found it could not approve the requested retail and roamer rates without additional evidence, and cited this as further reason to reject the agreement.

Because of the rejection, CRA's original protest and request for formal hearings are revived. The parties have 30 days to decide whether to amend the agreement so it is not contingent on adoption of increased retail rates or cease attempts at settlement and propose a formal hearing schedule.

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